



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

SUBJECT: Silicon Valley Ballet request for
exemption from Guidelines

FROM: RICHARD DOYLE
City Attorney

DATE: March 9, 2004

BACKGROUND

The Silicon Valley Ballet has requested an exemption from the Arts Operation Grant Guidelines which requires that all facilities for which grant funds are received must be accessible to the disabled.

The Arts Grant guidelines address accessibility in two different areas. The first, which applies to any organization seeking an operating (arts) grant, stipulates that the “organization provides its arts activities in venues that are accessible to people with disabilities.” The second requirement, which applies to otherwise eligible organizations that wish to be classified within the Professional Arts Institution or Regional Arts Institution categories, stipulates that they must have “demonstrable use of wheelchair-accessible administrative offices and rehearsal, training or other facilities necessary to prepare programs.”

The Ballet is the sole occupant of a four-story building located at 40 North First Street. The Ballet has administrative offices on the second floor, including a box office, and has dance studios on, at a minimum, the first and third floors in which the Ballet has conducted rehearsals and dance classes. We do not have information on the current use of the fourth floor. The building's elevator functions but was shut down by the state inspector because it no longer meets current standards. According to the Ballet, the elevator cannot be retrofitted or modified to meet these standards. Again, according to information provided by the Ballet, the only way to restore full disabled access to the floors above the first floor would be to install a new elevator. The Ballet estimates that this work would cost between \$100,000 and \$300,000, although formal bids have not been solicited for the work. The more formal performances of the Ballet are held in public venues such as the San Jose Center for Performing Arts, which are ADA accessible.

The Ballet has applied for an operating grant to be used to support the Ballet's operations. Under the City's current grant conditions the Ballet may not use the City's grant funds toward capital expenditures such as the installation of a new elevator.

The purpose of this memorandum is to advise you of the legal duties of the various parties with regard to providing disabled access.

ANALYSIS

Title III of the Americans with Disabilities Act (ADA) requires that people with disabilities be provided with "full and equal enjoyment of the good, services, facilities, privileges, advantages or accommodations of any place of public accommodation." (§302). This requirement means that paths of travel to and from places of accommodation must be accessible to a person using a wheelchair. Normally, buildings which have public accommodations on a second floor or above must have a functioning elevator. Federal regulations require:

A public accommodation shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities...28 CFR §36.211

The question becomes then whether the Ballet's failure to replace the elevator can be excused because of the financial hardship described. The ADA does not speak to this exact issue. There is a standard for determining liability to failure to retrofit facilities constructed prior to the enactment of the ADA regulations. The standard is whether providing the access is "readily achievable."

Factors to be considered in determining whether an alteration is readily achievable include:

1. the nature and cost of the action needed;
2. the overall financial resources of the site involved in the action, the number of persons employed at the site, the effect on expenses and resources, legitimate safety requirements necessary for safe operation, including crime prevention measures or the impact of such action on the operation of the site;
3. the geographic separateness and the administrative or fiscal relationship of the site in question to the parent corporation or entity;
4. if applicable, the overall financial resources of any parent corporation or entity, the number of employees of the parent corporation or entity, and the number, type and location of its facilities; and
5. if applicable, the type of operation of the parent corporation or entity, including the composition, structure and functions of the workforce of the parent corporation or entity.

Section 36.201 (b) of the Title III regulations makes clear that both landlord and tenant are subject to the disabled access requirements for places of public accommodation. The landlord and the tenant can allocate responsibility for this obligation in the provisions of the lease. However, no lease provision can absolve a landlord of an obligation to provide a disabled person access to the areas of a leased property which are a place of public accommodation.

Under the lease SV Ballet took the property "as is" and the duty to pay for maintenance and repairs. As stated above, that arrangement does not absolve the landlord of claims that the property is not in compliance under the ADA. However ultimate liability under the ADA is not clear in this case because such a determination is based upon a balancing of several factors to determine if the removal of the barrier is "readily achievable".

Our Office has been advised that the SV Ballet does not have sufficient funds to replace the elevator. We do not have any specific information regarding the landlord, North Forty, LLC. However, we have

been informed that the owners of that entity may have substantial resources. Without more specific information, our Office is not in a position to advise you whether the SV Ballet or its landlord, North Forty, LLC, would be ultimately liable under Title III for failure to provide the access normally required under the ADA regulations.

The additional question is the City's duties with regard to ADA compliance. The action being taken by the City has a twofold consequence under an ADA analysis: 1, the City's decision to waive its own requirement for full disabled access as stated in the guidelines, and 2, the granting of funds in a situation where the program funded may be in violation of Title III regulations.

When the City issued its guidelines requiring disabled access as part of its funding it does not appear that it was legally required to do this. Thus, a decision by the City to not enforce one of its own requirements would not appear to be a violation of the ADA by the City

Our advice with regard to the second issue is somewhat problematic. It could be argued that the actual act of making the grant to the Ballet makes it more likely to put the Ballet in a position that they are in violation of the ADA. This is because the grant increases the Ballet's ability under the balancing test cited above to make the modification to provide access. In addition, careful consideration should be made with respect to under what conditions exceptions should be made to the grant funding criteria so that the program can be consistently applied to all grantees. Therefore, we suggest that whatever action the City might take with respect to granting an exemption include a condition that the disability access to the building be restored.

CONCLUSION

To sum up, our advice is as follows:

1. It appears that the Ballet's facilities do not currently meet ADA access regulations.
2. Both the Ballet and its landlord may be liable for an ADA violation for failure to make a readily achievable modification by installing a new elevator, but this determination depends on several factors including the resources of both entities.
3. The City may want to consider conditioning its award of grant on the grantee's showing that it will restore access within a reasonable period of time.

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